

# “They Punish Murderers, Thieves, Traitors and Sorcerers”: Aboriginal Criminal Justice as Reported by Early French Observers

DESMOND H. BROWN\*

*A common theme in the writings of European explorers, historians, and religious emissaries who were among the first to comment on the inhabitants of the western hemisphere was the absence in Aboriginal society of any concept of law. In some cases these early commentators may not have interpreted what they saw correctly, and they used French words with specific legal definitions that were not relevant in the context of the behaviour they attempted to describe. Evidence from their writings, especially those of the Jesuits, shows that there was in fact law among the Native peoples of the northeast, and particularly criminal law, albeit of a different kind and process than French law. In France, with retribution or deterrence as the objective of the judicial system, the individual alone was responsible for his or her actions and suffered punishment accordingly. In contrast, apart from cases of sorcery or betrayal, which were punishable by death, Aboriginal justice sought to restore social cohesion and harmony among the group by restitution, which was a collective responsibility.*

*L'absence de tout concept de droit dans la société autochtone est un thème récurrent des écrits des explorateurs, historiens et émissaires religieux européens, qui furent parmi les premiers à commenter le mode de vie des habitants de l'hémisphère ouest. Dans certains cas, ces premiers commentateurs ont peut-être mal interprété ce qu'ils ont vu et ils utilisaient des termes français à définition juridique précise ne s'appliquant pas, dans le contexte, au comportement qu'ils tentaient de décrire. Leurs écrits, surtout ceux des Jésuites, révèlent que le droit existait bel et bien chez les peuples autochtones du Nord-Est, surtout une justice pénale, bien que d'un type et aux mécanismes différents de ceux du droit français. En France, la rétribution et la dissuasion étant l'objectif du système judiciaire, la personne était seule responsable de ses actes et se voyait infliger des peines correspondantes. En revanche, hormis les cas de sorcellerie ou de trahison, passibles de mort, la justice autochtone cherchait à restaurer la cohésion et l'harmonie sociales au sein du groupe par la restitution, ce qui était une responsabilité collective.*

\* Desmond Brown is adjunct professor in the Department of History and Classics at the University of Alberta. The author would like to thank Jacques Vanderlinden and Howard Welch who read this paper in draft and whose comments were detailed and cogent.

A COMMON THEME in the writings of European explorers and cosmographers who were among the first to comment on the inhabitants of the western hemisphere was the absence in Aboriginal society of law, religion, or other cultural characteristics common in contemporary Europe. Thus Pietro Martire, an Italian historian who chronicled the voyages of Christopher Columbus to the Americas in the 1490s, wrote that its inhabitants “were without laws, without books, without judges”.<sup>1</sup> Similarly, when writing of his voyages to the western hemisphere and his encounters with the indigenous peoples, Amerigo Vespucci reported in 1504 that “we did not find that these people had any laws ... nor have they any place of worship”.<sup>2</sup> These reporters were echoed in 1558 by André Thevet, the cosmographer of the French court. Thevet interrogated seamen who had met and bartered with the tribes of coastal North America, explorers who had journeyed inland, and Aborigines who had been taken to France. He concluded that they were “a marvelous strange wild brutish people, without fayth, without lawe, without Religion, and without any civilitie”.<sup>3</sup>

In particular, concerning the peoples who inhabited the culture area<sup>4</sup> that is now southeastern Canada, this was a recurring theme in the works of Samuel de Champlain, the French geographer, explorer, and author. One of the first Europeans to travel widely in the company of tribesmen of the northeastern woodlands and to write about his experiences, Champlain maintained that the Montagnais “are for the most part a people that has no law” (1603). Of the Laurentian tribe which inhabited the area about Quebec, he said, “there is no law amongst them” (1608). During his time with the Huron of what is now southern Ontario, he observed, “as for their laws I did not see that they have any, nor anything approaching them” (1616).<sup>5</sup> Similarly, Marc Lescarbot, a French lawyer and classical scholar who had pioneered for a year at Port Royal (Annapolis Royal, Nova Scotia) and who visited the lower Saint John River and the country thereabouts in 1606–1607, wrote that indigenous peoples in general were “without God, without law, without religion, living in pitiable Ignorance”. He said, in particular, that Algonquins, Montagnais, and Etechemins (Malecites) “were a race

1 Pietro Martire, *The Decades of the New Worlde*, ed. and trans. Richard Eden (1555), in Edward Arber, ed., *The First Three English Books on America* (1511–1555; London: Richard Constable, 1895), p. 78.

2 Amerigo Vespucci, *The Letters of Amerigo Vespucci*, ed. and trans. Clement R. Markham (London: Hakluyt Society, 1894), p. 9.

3 Andrew Thevet [André Thevet], *The New Found Worlde, or Antarctike*, trans. T. Hacket (London, 1568; New York: De Capo Press, 1971), p. 36.

4 The term “culture area” is used in the sense given by R. Bruce Morrison and C. Roderick Wilson in *Native Peoples: The Canadian Experience*, 2nd ed. (Toronto: McClelland & Stewart, 1995): within a culture area the Native population has “regional similarities, and neighbouring groups tend to have features in common” (p. 16). The culture area discussed here is the Canadian territory south of a line drawn from Saginaw, Michigan, through Quebec City to the Gaspé Peninsula.

5 *The Works of Samuel de Champlain*, 6 vols., ed. and trans. H. H. Langdon and W. F. Ganong (Paris, 1603–1632; Toronto: Champlain Society, 1922), vol. 1, p. 111; vol. 2, p. 47; vol. 3, p. 143.

without law”.<sup>6</sup> Lescarbot’s judgement was endorsed in 1611 by the learned professor of theology, Father Pierre Biard, who said of the Algonquin tribes of eastern Canada that they “have neither laws nor magistrates”.<sup>7</sup>

It was true that the peoples who inhabited the northeastern woodlands had no written law, but, as will be demonstrated, they did have systems of social control to deal with disputes and offensive acts — criminal law — that were committed within a group: tribe, clan, band, or family.<sup>8</sup> In comparison with the ponderous, time-consuming procedures and the confusing mass of crimes and punishments that comprised the contemporary French penal law,<sup>9</sup> there was much less, but sufficient, indigenous criminal law. While there was no need at all for much that would, in France, now be termed private law<sup>10</sup> because of the differing imperatives that drove the two legal systems, there was adequate customary law governing family relations, inheritance, trade, and governance. Since the bulk of the written sources concerning these matters is contained in the writings of the religious, it is of importance to review the purpose for which these men were sent to North America, their qualifications for the task, and the system that governed their writings. A review of the elements of the French legal system of the time also helps us to comprehend what the Europeans quoted above, especially the lawyer Lescarbot and the priest Biard, meant by their remarks. What would they have expected to see and hear to have concluded that the indigenous peoples did have “law” in the word’s widest and most general meaning at that time?<sup>11</sup>

6 Marc Lescarbot, *The History of New France*, 3 vols., ed. and trans. W. L. Grant (1609; Toronto: Champlain Society, 1907), vol. 1, p. 5; vol. 2, p. 89.

7 Reuben James Thwaites, ed., *Jesuit Relations and Allied Documents* [hereafter *JR*], 73 vols. (Cleveland, Ohio, 1896–1901), vol. 2, p. 73.

8 The tribe was the larger unit of population and could number from a hundred or more to a few thousand. On occasion, several or all of the clans or bands met in tribal conclave to attend councils, to hold religious ceremonies, or to feast. However, the term and the concept must be used with caution. The word derives from the Latin *tribus*, which was coined to describe a specific entity. Hence, as A. S. Diamond points out in *Primitive Law Past and Present* (London: Methuen, 1971), when used to describe other groups, “the tribe remains a shadowy and even transient entity, mainly linguistic and bearing a name (if it has a name) more convenient for the use of the neighbour or anthropologist than significant to the people” (p. 178). See also the discussion on pp. 159–177.

9 Desmond H. Brown, “They Do Not Submit Themselves To The King’s Law: Amerindians and Criminal Justice During the French Regime”, *Manitoba Law Journal*, vol. 28, no. 3 (2002), pp. 388, 397. See also Carl L. von Bar, *A History of Continental Criminal Law* (1916; New York: Augustus Kelly, 1968), who remarked that “Crime [in France in the early seventeenth century] was anything that could be made the subject of punishment; and anything could be made the subject of punishment that the judge regarded as punishable” (p. 265).

10 That law “which comprises the principles and rules dealing with the relations of ordinary individuals with one another”. David M. Walker, *Oxford Companion to Law* (Oxford: Clarendon Press, 1980), p. 994.

11 “Law” in this sense would correspond to the system of law in a jurisdiction, as opposed to an individual law — statute, ordinance, or oral rule. The French language marks the distinction by using different words: *droit* for the system, *loi* for the statute or rule. For the full argument, see the article on law in Walker’s *Oxford Companion to Law*, pp. 716–720. See also the discussion on “The Concept of Law” in John Hudson’s *Formation of the English Common Law* (London: Longman, 1996).

In the states, principalities, dukedoms, and lesser honours of France at that time there were many different kinds of court. The French system is perhaps the best known, but it was replicated, more or less, in most western European jurisdictions.<sup>12</sup> Ecclesiastical tribunals governed by the Canon Law had a wide jurisdiction.<sup>13</sup> There were feudal or *seigneurial* courts, and city and *bourg* courts that administered the provincial *coutumes*, which began to be codified in the fifteenth century.<sup>14</sup> Seaport courts dispensed the Law of Oleron (maritime law), royal and provincial *parlements* had both original and appellate jurisdiction, and there were numerous other specialized tribunals.<sup>15</sup> Regardless of their stature and jurisdiction, these courts had several common characteristics. Sessions of a court were usually held in the same location, frequently in a building constructed for the purpose and known as such in the vicinity.<sup>16</sup> The bench — *juges* or royal counsellors — exercised its authority by ancient right or charter from the crown, or was appointed by those with such power. Its personnel usually wore distinctive outer garments and headdress to reinforce the pomp and ritual ceremony with which the proceedings were conducted.<sup>17</sup> Their judgements were based on written, enacted law — *ordonnances* or *édits*, for example — and customary law. In criminal cases, such judgements were enforced by the authority governing the jurisdiction: king, duke, count, or council.<sup>18</sup> Court officials and legal counsel were required to undergo a rigorous education or apprenticeship, and they, too, often wore distinctive garb.<sup>19</sup> Hence, when literate Frenchmen such as those quoted above spoke about the law, they were in all probability referring not only to books of written law and the personnel who operated the system, but also to the structures, trappings, and ceremony that were the visible manifestations of state authority.

The richness and diversity of this system no doubt obscured the funda-

12 Harold J. Berman, *Law and Revolution* (London: Harvard University Press, 1983), p. 25.

13 *Ibid.*, pp. 10, 51. For an illustrated overview of the Papal legal system, see John Henry Wigmore, *A Panorama of the World's Legal Systems* (Washington, D.C.: Washington Law Book Company, 1936), pp. 935–960.

14 O. F. Robinson, T. D. Fergus, and W. M. Gordon, *European Legal History*, 2nd. ed. (London: Butterworth, 1994), pp. 33, 200.

15 Berman, *Law and Revolution*, pp. 357–403, 467–476; R. C. Van Caenegem, *An Historical Introduction to Private Law* (Cambridge: Cambridge University Press, 1992), pp. 25–26, 99–109; Monroe Smith, *The Development of European Law* (New York: University of Columbia Press, 1928), pp. xvii–xxvi, 223–246.

16 Wigmore, *A Panorama of the World's Legal Systems*, p. 857, n. 26; pp. 862, 99–1003, 1016; “Governmental Architecture”, *Encyclopedia Britannica*, 1973 ed.

17 Maurice Leloir, *Dictionnaire du Costume* (Paris: Librairie Grund, 1951), p. 246; Jacques Ruppert, *Histoire du Costume* (Paris: R. Ducher, 1930), p. 24; François Boucher, *20,000 Years of Fashion* (New York: Harry N. Abrahams, 1967), pp. 201–202; *Zur Geschichte der Costume* (n.p.: Braun & Schneider, 1895), p. 438; Wigmore, *A Panorama of the World's Legal Systems*, pp. 1000–1002.

18 Berman, *Law and Revolution*, pp. 476, 500–517, 535; Smith, *The Development of European Law*, pp. 227–252.

19 Berman, *Law and Revolution*, pp. 123–127; Smith, *The Development of European Law*, pp. 263–267.

mental principles on which it was based because no legal writer of that time (or, indeed, before or since) has offered a definition of “law” with which all legalists can agree.<sup>20</sup> Therefore the writer endorses the formulation of the cultural anthropologist A. S. Diamond as being the most general and least technical of several definitions that say essentially the same thing. Law consists of three elements: a set of accepted rules to govern a community, imposition of sanctions to enforce the rules, and regularity in the imposition of sanctions.<sup>21</sup>

In the context of this argument, however, the cases that came before French tribunals of the sixteenth and seventeenth centuries are of greater importance than the abstract definition of “law” because they reveal the imperatives that drove the French legal system. As land became scarce because of the increase of population, litigation was, in the main, about real property — land and structures. Land was wealth and relatively scarce, so that much judicial time was spent adjudicating disputes that arose from the survey, sale, purchase, and devolution of real property. This fact was ruefully summarized in the ancient maxim quoted by the lawyer Lescarbot: “land and law suits go together.”<sup>22</sup> Additionally, after the hiatus caused by the onslaught of the Scandinavians, Muslims, and Magyars during which time trade routes in Europe were disrupted and the movement of trade goods slowed to a trickle or ceased altogether, commerce had begun to expand rapidly. Hence, there was also increasing litigation about transportation, goods, markets, contracts, and rents that were payable in the coinage of the day or by sophisticated bankers’ instruments. In step with this expansion of wealth and goods a whole spectrum of criminal law was developed: from treason, murder, rape, arson, and theft, through counterfeiting and forgery, to assault and perjury (bearing false witness).<sup>23</sup> Those who were convicted of such crimes were accountable for their misdeeds and had to bear the consequences. These could be, but were not limited to, retribution in the form of torture, capital or corporal punishment, monetary or economic deprivation,

20 In his *Quest for Law* (New York: Knopf, 1941), William Seagle cites definitions of “law” from sources as varied as Demosthenes and the Russian Penal Code of the time (pp. 3–4). No two are even close to saying the same thing. Later writers come closer in meaning, but there is still no agreement on a standard definition. Two examples will illustrate: E. Adamson Hoebel, in *The Law of Primitive Man* (Cambridge, Mass.: Harvard University Press, 1967), holds that “A social norm is legal if its neglect or infraction is regularly met, in threat or in fact, by the application of physical force by an individual or group possessing the socially recognized privilege of so acting” (p. 28). Leopold Posp’cil, in *Anthropology of Law* (New Haven, Conn.: HRAF Press, 1974), defines “law” as “rules or modes of conduct made obligatory by some sanction which is imposed and enforced for their violation by a controlling authority” (p. 40). For an exhaustive discussion of this subject and for other opinions of what “law” is, see Norbert Rouland, *Legal Anthropology*, trans. Philippe G. Planel (Stanford: Stanford University Press, 1994), pp. 103–135.

21 Diamond, *Primitive Law*, p. 195.

22 Lescarbot, *The History of New France*, vol. 3, p. 216.

23 Berman, *Law and Revolution*, pp. 476–477.

or imprisonment.<sup>24</sup> If the punishment was to be physical, it was staged in a public place and followed a set ritual that was designed to overawe the onlookers with the power of the monarch or the state.<sup>25</sup> Given all this formality, compared with the apparent lack of it among Aboriginal peoples, it was understandable that the French and other Europeans who had travelled among them and visited them in their tribal settings or who had questioned Aboriginals who had been taken to Europe asserted that they had no law.

Whereas litigation about land, commerce, and the acquisition and protection of wealth and possessions dominated the French system, there was land aplenty in the northeastern woodlands, and the enormous tract occupied by a tribe was held communally.<sup>26</sup> Living space in seasonal locations within this area occupied by clans, bands, and families was the property of the particular group, as were also fields, garden plots, fishing holes, and hunting territories adjacent to semi-permanent settlements.<sup>27</sup> But there was no concept of individual, personal ownership of land or structures in the European sense, so the largest source of litigation in Europe was absent, as were the courts where it would have been carried on. There was trade among the tribes, but since, apart from wampum, there was no standard currency nor any written instruments, the transactions were, in the main, carried on by barter and thus did not give rise to the complicated litigation that habitually arose from European commerce.<sup>28</sup> All artifacts — articles of adornment, clothing, pottery, cooking vessels, weapons, tools, canoes — were hand-crafted from plant material, wood, bark, stone, or animal matter, and thus immediately

24 Michel Foucault, *Discipline and Punish* (New York: Vintage Books, 1979), pp. 32–33; Berman, *Law and Revolution*, pp. 183–186, 476–477.

25 For an account of an execution preceded by torture see Foucault, *Discipline and Punish*, pp. 3–6.

26 Recent estimates of the population of North America north of Mexico at the time of first contact with Europeans early in the sixteenth century range from about 4.5 to 18 million, giving an average population density of from 20 to 95 persons per 100 square kilometres. Morrison and Wilson, *Native Peoples*, p. 51.

27 James Tully, “Aboriginal Property and Western Theory: Recovering a Middle Ground”, *Social Philosophy and Policy*, vol. 11 (Cambridge: Cambridge University Press, 1994), pp. 166–169. See also James Axtell, *Beyond 1492* (New York: Oxford University Press, 1992), p. 202, and the essay on land tenure in Frederick Webb Hodge, ed., *Handbook of American Indians North of Mexico*, 2 vols. (1912; Grosse Pointe, Mich.: Scholarly Press, 1968), vol. 1, pp. 756–757.

28 In North American prehistory, wampum consisted of white beads made from shaped and polished seashells and could be used as a form of currency or, strung together on animal sinew or string, worn as an article of adornment. At the turn of the seventeenth century the functions of wampum were augmented by white and other coloured beads strung in various combinations and made into belts that were used as mnemonic devices to record such things as messages of condolence or the articles of a treaty. Frederick E. Hoxie, *Encyclopedia of North American Indians* (Boston: Houghton Mifflin, 1996), pp. 662–664. For illustrations of Aboriginal fashions and wampum belts, see *The Works of Samuel de Champlain*, vol. 3, pp. 134–138; Joseph François Lafitau, *Customs of the American Indians Compared with the Customs of Primitive Times*, 2 vols., trans. William N. Fenton and Elizabeth L. Moore (Paris, 1562; Toronto: Champlain Society, 1974), vol. 2, pp. 25, 184. See also the illustrations of wampum used in condolence ceremonies in Anthony Wallace, “Origins of the Longhouse Religion”, *Handbook of North American Indians* (Washington: Smithsonian, 1978), pp. xv, 437.

identifiable, and the larger items were held and used communally.<sup>29</sup> This was also the case with the living space in cabins or wigwams that housed one, two, or more families and where there was little or no privacy.<sup>30</sup> Thus, before trade with Europeans began, and with the possible exceptions of wampum or medicine bundles, there was little incentive to abstract a movable possession from an individual or from the common store for personal use or gain: that is, to “steal” (*vol*, as the French would have said).<sup>31</sup> Indeed, given the absence of cognate words or expressions in their languages for these European concepts or actions, it is doubtful if indigenous peoples of the northeast at first contact could have comprehended the meaning of “private property”, “buying and selling”, or “theft” in the context of interpersonal relations within their community — tribe, clan, band, or family. Certainly, early French observers in the northeast did not think so.<sup>32</sup> In strik-

29 *JR*, vol. 38, pp. 245–249; Lescarbot, *The History of New France*, vol. 2, p. 352; Gabriel Sagard, *The Long Journey to the Country of the Hurons*, trans. H. H. Langdon (Paris, 1632; Toronto: Champlain Society, 1939), pp. 108–109; Nicolas Denys, *The Description and Natural History of the Coasts of North America [Acadia]*, ed. and trans. William F. Ganong (Paris, 1672; Toronto: Champlain Society, 1908), pp. 400–403. See also Morrison and Wilson, *Native Peoples*, p. 319.

30 *The Works of Samuel de Champlain*, vol. 3, pp. 122–232; *JR*, vol. 3, p. 77; vol. 8, pp. 105–109.

31 Given the communal living conditions of Aboriginal communities, it would have been difficult to account for the possession of any quantity of wampum not previously known to have been in the possession of an individual. Medicine bundles would have been an attractive item to steal for a person who wished to do harm by sorcery to the owner of the bundle. For sorcery and sorcerers, see note 121 below; for the contents of a medicine bundle, see Chrestien le Clercq, *New Relation of Gaspesia*, ed. and trans. William F. Ganong (1691; Toronto: Champlain Society, 1910), pp. 221–223.

32 In 1612, after spending several months studying the language of the Mi'kmaq, the learned Jesuit Father Pierre Biard, who had previously been professor of theology at Lyon, said that he had experienced great difficulty in his study because the Mi'kmaq had neither an interpreter nor a teacher to instruct him. Moreover, “as these savages have no formulated Religion, government, towns nor trades, so the words and proper phrases for all those things are lacking; Holy, Blessed, Angel, Grace, Mystery, Sacrament, Temptation, Faith, Law, Prudence, Subjection, Authority, etc.” (*JR*, vol. 3, p. 195). Lucien Campeau, “Pierre Biard”, *Dictionary of Canadian Biography* (hereafter *DCB*) (Toronto: University of Toronto Press, 1966–1994), vol. 1, p. 94. Biard's words were echoed in 1634 by a fellow Jesuit, Father Paul le Jeune, a former professor of rhetoric at the colleges of Nevers and Caen. After six months of living and travelling with a band of Montagnais in order to learn their language, le Jeune wrote a seven-page paper on the grammar and vocabulary of the language. In part he said that, while it was “gorged with [a] richness” of words that could not be translated into French except by circumlocutions, “all words which refer to the regulation and government of a city, Province, or Empire; all that concerns justice, reward and punishment ... all these things are never found either in the thoughts or upon the lips of the Savages.” *JR*, vol. 6, p. 101; vol. 7, p. 21; Léon Pouliot, “Paul le Jeune”, *DCB*, vol. 1, pp. 453–458. Earlier, in 1618, the lawyer and historian Marc Lescarbot had also made remarks similar to those of Biard about the Mi'kmaq language after an equally brief study. More to the point, he compiled a French/Mi'kmaq vocabulary in which there is not one word or expression that refers either to law, band, or clan regulations or to religion (*History of New France*, vol. 2, pp. 179–180; vol. 3, pp. 117–125). Lescarbot's work was amplified for the Iroquoian language of the Huron by the classically educated Récollet, Gabriel Sagard. After studying the language during his sojourn among the Huron in 1623–1624, he wrote a 144-page bilingual dictionary in which words and phrases relating to these subjects are conspicuous by their absence (*The Long Journey*, pp. 73–74). The dictionary is in *Sagard's histoire du Canada et voyages*, 4 vols. (1636; Paris: Librairie Tross, 1866), vol. 4, Appendix. See also Brébeuf on the language of the Hurons, *JR*, vol. 10, pp. 117 ff.

ing contrast with France and other European jurisdictions, the imperatives of law and life in the northeastern woodlands were social cohesion and harmony. As hunters, gatherers, agriculturists, or any combination of these, the peoples of the northeast were organized in kin-groups — clans and bands — some or all of whose members annually ranged over a large area in search of sustenance. While success in hunting, gathering, or growing might depend on the weather in any given year, success in these endeavours was absolutely dependent on the social cohesion of the community at all times. To survive it was essential to maintain harmonious relations. To give offence would cause dissension within the group, which would certainly lessen its ability to function, if it did not cause the aggrieved to drive out the offender.<sup>33</sup> A lone man or woman had little chance of survival without the support of the group. At worst, dissension might cause individuals to take sides and thus lead to the disintegration and destruction of the kin-group. Therefore, if an act were committed that offended or frightened members of the group, it was essential to restore social cohesion, principally by making restitution to the injured parties, rather than by punishing the offender in the European sense.<sup>34</sup> As A. I. Hallowell argues, the psychological conditioning that was such an essential component of northeastern woodlands culture equipped its members with the ability to carry out this task.<sup>35</sup> Hence, they were far less prone than their French contemporaries to commit acts that were classified as crimes in the French legal system, particularly violent crimes. This very fact often caused comment by early observers. Thus, wrote Lescarbot in 1608, the peoples of Acadia “have few quarrels”, an opinion reinforced in 1632 by Father Paul le Jeune, who declared that the Montagnais “are not given to many offences”.<sup>36</sup> Even decades later the Récollet friar Chrestien le Clercq was still able to say of the Mi’kmaq: “They never quarrel and never are angry with one another...”<sup>37</sup> Speaking of murder in Huronia in 1636, the Jesuit Father Jean de Brébeuf said that there is “little disorder ... among them in this respect”, a view echoed in 1652 by a younger member of the Order, Father Francesco Bressani, who wrote that murders “are very rare” among the Huron.<sup>38</sup>

33 See, for example, the incident cited by Hoebel, *The Law of Primitive Man*, p. 73, in which a woman was expelled from her band in mid-winter for infraction of a tribal sanction. Although the case pertains to a Labrador woman, the offence and the band reaction illustrate the principle.

34 Diamond, *Primitive Law*, pp. 170, 191.

35 A[rthur] I[rving] Hallowell characterized the emotional structure of the northeastern Aboriginal as “a multifaceted pattern of emotional restraint or inhibition” in “Some Psychological Characteristics of the Northeastern Indians” in Frederik Johnson, ed., *Man in Northeastern North America* (Andover, Mass.: Phillips Academy, 1946), p. 204. See also note 80 below.

36 Lescarbot, *The History of New France*, vol. 3, p. 215; *JR*, vol. 5, p. 35.

37 Le Clercq, *New Relation of Gaspesia*, p. 242.

38 *JR*, vol. 10, p. 215; vol. 38, p. 273. See also note 80 below for Hallowell’s further development of this topic. For an opinion as to how the consumption of alcohol altered this behaviour, see le Clercq, *New Relation of Gaspesia*, pp. 255–256.



When the members of these widely dispersed tribes conversed, they did so in one of the two primary language families in the culture area, Algonquin or Iroquoian, and each included several different but related dialects spoken by the tribes of each family.<sup>39</sup> These ranged from the nomadic Algonquin-speaking Montagnais hunter-gatherers of what is now northern Quebec to their linguistic cousins, the semi-nomadic Mi'kmaq of Acadia who lived on a diet of fish, game, and berries.<sup>40</sup> The agricultural Huron to the southwest spoke an Iroquoian language, and outside their dwellings "it was easier to get lost in a corn field than in a forest".<sup>41</sup> These peoples were associated in kin groups that ranged from a few dozen Montagnais or Mi'kmaq, who lived in portable wigwams,<sup>42</sup> to several hundred Huron who lived communally in semi-permanent longhouses in palisaded villages.<sup>43</sup> Although these groupings had different means of subsistence, lived in different dwellings, and spoke different languages, their law — the rules as defined above which governed their communities — appears to have been remarkably similar.<sup>44</sup> The question is, how do we know what these rules were, given the absence of a record written by the indigenous peoples, the lapse of nearly 400 years, and the consequent scarcity of persons with the detailed knowledge necessary to supplement the existing written record with oral history? In large part, the answer is found in the letters and papers of persons with a particular interest in the indigenous population.

In 1540, when the French monarch, Francis I, determined to colonize the *terra incognita* that had recently been titled "New France"<sup>45</sup> to exploit the "many good commodities found there", he set in motion a process that brought several diverse groups to the colony.<sup>46</sup> Each had specific aims and desires: governors and administrators wanted new subjects for the crown and security from other European interlopers; military leaders were in search of allies; merchants and traders wanted fur and fish; and the religious sought souls — converts to Christianity. To achieve these objectives, the indigenous peoples and their societies were studied so that ways and means could be devised to cause them to fall in with French plans. Many reports and narratives were written that detail the success or failure of such endeavours. Unfortunately, since very few of the first secular writers had literary gifts — Marc Lescarbot, Samuel de Champlain, and Gabriel Sagard are the only exceptions

39 Morrison and Wilson, *Native Peoples*, p. 29.

40 *JR*, vol. 1, pp. 83–85, 147–149; vol. 3, p. 77.

41 Olive Patricia Dickason, *Canada's First Nations* (Toronto: McClelland & Stewart, 1992), p. 70.

42 *JR*, vol. 1, pp. 83–85; vol. 3, p. 77.

43 *JR*, vol. 8, pp. 105–109; vol. 38, p. 247; Bruce G. Trigger, *The Children of Aataentsic* (Montreal and Kingston: McGill-Queen's University Press, 1987), p. 32.

44 See the discussion in Hallowell, "Some Psychological Characteristics", pp. 197–198, 216–218.

45 Giovanni da Verrazzano, a Florentine navigator and explorer in the service of France, apparently coined the name "New France" (Novo Gallia) for use on a map made circa 1527, now lost. William A. Morley, "Giovanni da Verrazzano", *DCB*, vol. 1, p. 657.

46 James Phinney Baxter, *A Memoir of Jacques Cartier* (New York: Dodd, Mead, 1906), pp. 315–316.

who come to mind — and since their tendency was to see the peoples of the northeast as means to an end, rather than as individuals, their writings do not shed much light on the peoples or their culture.<sup>47</sup> The religious, however, were assigned by successive monarchs a specific role in such enterprises, and they made up for many of the shortcomings of their secular fellows.

In his commission to Jean-de-la-Rocque de Roberval, commander of the abortive colonizing expedition of 1540, Francis I directed him to “construct ... temples and churches for the communication of our Holy Catholic Faith, and Christian doctrine”.<sup>48</sup> In subsequent documents of this nature, the propagation of Christianity and the conversion of the indigenous peoples was always included as an objective of any expedition. To begin the process, Jesuits, members of the Society of Jesus, including Father Pierre Biard, disembarked at Port Royal (Annapolis Royal) in 1611.<sup>49</sup> Biard’s first letter to Father Christopher Baltazar, the Jesuit Provincial of France, described briefly his new surroundings and his first impressions of the Abenake and Mi’kmaq peoples and their customs, as well as plans for his apostolate.<sup>50</sup>

This communication was not an individual initiative. It was compiled and dispatched in accordance with instructions in the *Constitutions* of the Society of Jesus of 1540. Such provision was rendered necessary by the fact that the principals who constituted the founding members of the Society were not colleagues in close, everyday contact, as had been the usual pre-condition to the founding of an Order of the Church.<sup>51</sup> Rather, they were a group of itinerant, university-educated secular priests (regular clerks) of several nationalities who were devoted to social and educational works among the general population, the defeat of the Reformation, and, in particular, the foundation of missions overseas to spread the faith to unbelievers. During their university years they had formed an association, but after completing their studies they pursued their vocations in several locations across Europe<sup>52</sup> — hence the early promulgation of instructions about what and when to communicate by correspondence within the Society. By 1565 three types of annual report were required to be submitted.<sup>53</sup>

47 Nicolas Denys could not be said to have a literary gift, but his *Description and Natural History of Acadia* provides much valuable information about Acadia and its Aboriginal population from the 1630s to the 1660s.

48 Baxter, *A Memoir of Jacques Cartier*, pp. 315–316.

49 *JR*, vol. 1, p. 6; vol. 3, p. 161. See also Joseph P. Donnelly, *Thwaites’ Jesuit Relations Errata and Addenda* (Loyola University Press, 1967), p. 49; Campeau, “Pierre Biard”, *DCB*, vol. 1, p. 95.

50 *JR*, vol. 1, pp. 139–183.

51 Donnelly, *Thwaites’ Jesuit Relations*, pp. 31–35; J. C. H. Aveling, *The Jesuits* (London: Blond & Briggs, 1981), pp. 156–157.

52 Aveling, *The Jesuits*, pp. 73–78, 98–110; Donnelly, *Thwaites’ Jesuit Relations*, p. 34.

53 The three reports were mandatory; they were not, of course, the only communications among the Jesuits. See Aveling, *The Jesuits*, pp. 157–160; Donnelly, *Thwaites’ Jesuit Relations*, pp. 32–34; *The Catholic Encyclopedia*, 1st ed., 15 vols. (New York: Robert Appleton, 1912), vol. 14, p. 96. The first edition is cited because much of the detailed information about annual Jesuit publications found in the first edition is omitted in the second edition of 1967.

The first was a secret letter from a father-provincial or the superior of an overseas mission to the Father-General in Rome that gave an uninhibited account of the establishment, its personnel, and problems for the period under discussion. The second was the “annual letter” from a superior of a mission overseas to his father-provincial. These missives were written in a standard format and included statistics, conversions of unbelievers, problems solved, good works accomplished, and “remarkable events” — visions, miracles, and the like.<sup>54</sup> Although written to form, these letters were by no means stereotypes. Flowing from the pens of men who were required to complete more than ten years of study and teaching of the humanities, philosophy, and theology before being allowed to take the final vow that qualified them for service overseas, the letters were individual, literate, and often graceful and expressive.<sup>55</sup> With the steady growth of the Society and the dispatch of Jesuits to found missions in India, Japan, China, South America, and elsewhere in the Orient and Africa, the quantity of interesting and informative literature about these exotic locales and about the trials and tribulations of the authors in all locations grew rapidly. It soon became the practice to edit these letters and circulate copies of the edited versions to the provincials of the Society to be used for the edification and information of all members of the Order. This practice became formalized in 1581 with the publication of the first volume of *Litterae annuae Societatis Jesu ad patres et fratres ejusdem Societatis*. However, as the title indicates, the content of annual volumes was still for the eyes of Jesuits alone. On the contrary, the “edifying letter”, the third type of annual report, was intended to be printed and sold to the public as a means of publicizing the apostolic activity of the Society and of soliciting financial aid for its mission.<sup>56</sup> This missive was also sent by a superior to his father-provincial, and consisted of the letters and oral reports generated by the personnel of a mission and edited by their superior. As such, an edifying letter included some of the material from the annual letter, integrated with an account of the events of the year at the mission to provide a coherent narrative, and it also elaborated on the flora and fauna of the surrounding area, the apostolic activity, and the culture of the Aboriginal people of the area.<sup>57</sup> Publication of these often long and detailed manuscripts from overseas began in the middle years of the sixteenth century, so that, by the time Father Biard sent his letter of 1611 to Chrisophe Baltazar, his Father-Superior in Paris, the reporting system of the Society was well established. Moreover, members of the Society who had, during their education, read classical authors on the culture of the ancients had also had the opportunity to compare these accounts

54 Aveling, *The Jesuits*, pp. 156–157.

55 *Ibid.*, pp. 79–80, 107; Donnelly, *Thwaites' Jesuit Relations*, p. 39. See also William V. Bangert, *A History of the Society of Jesus* (St. Louis, Mo.: Institute of Jesuit Sources, 1971), p. 43.

56 *The Catholic Encyclopedia*, 1st ed., vol. 14, p. 96.

57 *Ibid.*

with those of their colleagues in and from the missions overseas and to draw comparisons between the cultures.<sup>58</sup>

While Biard's first report to Balthazar in 1611 was in the form of an annual letter, his long delayed second report was an edifying letter.<sup>59</sup> It was dedicated to the king, Louis XIII, and published in Paris in 1616 as *Relation de la Nouvelle France*.<sup>60</sup> In effect, this is the first of 43 volumes that have come to be known as the *Relations de la Nouvelle-France*, the series of edifying letters that chronicle the activities of the Jesuits in New France from 1611 to 1673.<sup>61</sup> These volumes, together with subsequent edifying letters, material from secret letters, annual letters, and other sources written before the suppression of the Society in France in 1764, were translated into English and published in 73 volumes as *The Jesuit Relations and Allied Documents*.<sup>62</sup> This collection constitutes the bulk of the primary written sources about the indigenous population of New France. Concerning the men who authored these documents, the editor had this to say:

The authors ... were for the most part men of trained intellect, acute observers, and practiced in the art of keeping records of their experiences. They had left the most highly civilized country of their times, to plunge at once into the heart of the American wilderness and attempt to win to the Christian faith the fiercest savages known to history. To gain these savages it was first necessary to know them intimately, — their speech, their habits, their manner of thought, their strong points and their weak. These first students of the North American Indian were not only amply fitted for their undertaking, but none have since had better opportunity for its prosecution.<sup>63</sup>

While the author of this passage had the mind-set and vocabulary of a bygone era, as did the authors he translated, there is no question that he was correct about his confident assertion that there were none better than the Jesuits to observe and record the habits, manners, and customs of the Aboriginal peoples of the northeastern woodlands. During the period covered by the

58 See, for example, Father Julien Perrault's comparison of his own experience in 1634 among the Mi'kmaq on Cape Breton Island to that of St. Francis Xavier in the Orient in the 1550s (*JR*, vol. 8, p. 189).

59 Biard was captured at Mont Désert in 1613 by the Englishman, Captain Samuel Argall, during his expedition to expel the French from reputed English territory. Biard was eventually taken to England and finally released to France in 1614 (Campeau, "Biard", *DCB*, vol. 1, p. 95).

60 *JR*, vol. 3, pp. 21–283; vol. 4, pp. 7–165.

61 Biard's *Relation* of 1616 was one of a kind, as was the volume of the Jesuit superior at Quebec in 1626 that was published as *Lettre du père Charles l'Allemant [sic]*, *JR*, vol. 4, p. 188. The first of the 41 consecutive annual volumes titled *Relations de la Nouvelle-France* was published by Sébastien Cramoisy in Paris in 1632 (*The Catholic Encyclopedia*, 1st ed., vol. 14, p. 96). For details of this series and the reason for its cessation, see Donnelly, *Thwaites' Jesuit Relations*, p. 2, nn. 4, 5.

62 *JR*, vol. 1, pp. 38–39.

63 *Ibid.*, p. 38. See also James Axtell's appraisal of the Jesuits as the best educated and most able "agents of change" in colonial America in *Beyond 1492*, pp. 155–157.

*Relations* the authors were dispersed to different tribes and actually lived among them for periods ranging from months to several years. Thus, in the early years of the seventeenth century, the first years of successful penetration and settlement of northeastern woodlands by the French, the Jesuit commentators, apart from Marc Lescarbot, Samuel de Champlain, the Récollet Gabriel Sagard, and Nicolas Denys, were the only Europeans who shared the lives of the indigenous peoples. They lived in their habitations, ate their food, observed their customs, paddled and portaged their canoes, learnt and spoke the languages of the country, and wrote about their experiences.<sup>64</sup> In this way the first commentators were able to observe and to report on the indigenous peoples of the northeast in their immediate post-contact state, as seen through the cultural filter of their own education and experience.<sup>65</sup>

Although they found a society very different from that of France and the Europe they knew, the Jesuits and other commentators educated in the classics quickly discovered that they were able to draw many parallels between the customs and behaviour of peoples of the eastern woodlands and the remote peoples of Greek, Roman, and middle eastern antiquity, as well as their own Germanic ancestors. For instance, as the peoples of each of these ancient societies worshipped a pantheon of gods whose mysteries were propagated by a priesthood, so the peoples of the northeast had religious beliefs and sacred practitioners. All such systems of faith were, of course, antithetical to those who propagated Christianity, but there is no doubt that they were religions and came to be recognized as such.<sup>66</sup> In another case, just as the ancients had observed and taken note of natural phenomena, so had the Aboriginal peoples. In consequence, they had divided the year into four seasons and had given each a name. However, as Brother le Clercq pointed out, each year consisted of 10 moons, or months, just as it did in Roman times until the Julian calendar of 12 months was promulgated.<sup>67</sup> During his explorations in Acadia in 1607–1608, Marc Lescarbot observed the nomadic life and marine diet of the coastal tribes and cited Pliny the Elder to compare them with the Ichthyophagi, who had inhabited the northern coast of the Persian Gulf; on the subject of nutrition, he cited Pliny again to compare the early Roman method of cooking corn with the Aboriginal practice.<sup>68</sup> Father

64 Father Paul le Jeune gives an illuminating summary of his life with the Montagnais during his ministry to that tribe during the winter of 1634–1635 in *JR*, vol. 7, pp. 35–65.

65 Hallowell, "Some Psychological Characteristics", pp. 197–198.

66 *JR*, vol. 2, pp. 75–77; see especially Father Paul le Jeune's detailed account of the Montagnais variant of the Aboriginal religion, *JR*, vol. 6, pp. 157–183, and Father Bressani's chapter on that of the Huron, vol. 39, pp. 123–137. See also Lescarbot, *The History of New France*, vol. 2, pp. 89–91; Sagard, *The Long Journey*, pp. 167–176; le Clercq, *New Relation of Gaspesia*, pp. 143–144; Lafitau, *Customs of the American Indians*, vol. 1, pp. 93–282. See also Michel Pommel, "Beyond Unbelief: Early Jesuit Interpretations of Aboriginal Religions", *Studies in Religion*, vol. 16, no. 3 (Summer 1987), pp. 275–287.

67 Le Clercq, *New Relation of Gaspesia*, p. 138; *JR*, vol. 4, p. 223.

68 *JR*, vol. 1, pp. 83, 85.

Joseph Lafiteau, the Jesuit historian, quoted his Greek predecessor, Herodotus, to show the resemblance between the matrilineal basis of Iroquoian and Huron society and the similar custom of the Lycians of Asia Minor.<sup>69</sup> According to other reporters, similarities between their Germanic ancestors and the Aborigines were that they were unable to communicate by written instruments, the style and substance of their dress and adornments were similar, and their women breast-fed their infants, since the very idea of a wet nurse was abhorrent to them.<sup>70</sup> Both peoples were generous and unstinting in their hospitality to all who came in peace. But they were also able and fearless warriors, who prized the heads of their enemies as trophies, who used similar techniques to treat the wounded, and who were renowned for the care they lavished on their dead, whom they would not allow to remain in the hands of an enemy.<sup>71</sup> Discovering these similarities between ancient cultures and those of the Aboriginal peoples caused early commentators to realize that the indigenous societies in New France were not wholly different from the contemporary and ancient cultures they had studied during their education, although their attention was mainly engaged in observing that which to them was new or unprecedented.

There were some obvious differences: there were no major population centres in the northeastern woodlands, and, excepting the tribes of agriculturists who had settled in what is now southern Ontario and northern New York, the small groups who made up the population were widely dispersed over the thickly forested terrain to take best advantage of the food supply.<sup>72</sup> There was little or no metal, and weaponry was of a different and less lethal order than the cannon, small arms, and steel side-arms of the French. Certain food items, such as corn, bush beans, and pumpkins, for instance, were unknown in Europe,<sup>73</sup> while fermented and distilled beverages did not exist in the woodlands.<sup>74</sup> There were several observed behavioral differences that caused much

69 Lafiteau, *Customs of the American Indians*, vol. 1, pp. 68–72.

70 Lescarbot, *The History of New France*, vol. 3, pp. 86, 128, 132, 135; le Clercq, *New Relation of Gaspesia*, pp. 90–91; Lafiteau, *Customs of the American Indians*, vol. 2, p. 25; *JR*, vol. 34, p. 295.

71 Lescarbot, *The History of New France*, vol. 3, pp. 186–187, 270–271; Sagard, *The Long Journey*, pp. 153–162; le Clercq, *New Relation of Gaspesia*, p. 238; Lafiteau, *Customs of the American Indians*, vol. 2, pp. 139, 145–147.

72 *JR*, vol. 3, p. 41.

73 *The Works of Samuel de Champlain*, vol. 1, p. 328.

74 Lescarbot, *The History of New France*, vol. 3, pp. 176–177; le Clercq, *New Relation of Gaspesia*, pp. 109, 253–256; Denys, *Description and Natural History*, pp. 251–256; Lafiteau, *Customs of the American Indians*, vol. 2, pp. 72–73. Lescarbot, le Clercq, and Lafiteau all make positive statements that intoxicating beverages were unknown to the Aborigines of the northeastern woodlands when Europeans arrived, and Lescarbot draws a parallel between the intoxicating effect of liquor on the European and tobacco on the Aboriginal. Father Bressani also comments on the absence of wine among the Huron (*JR*, vol. 38, p. 245), and other oblique statements to the same effect are contained in the *Relations*. The absence of alcohol can also be inferred from indirect evidence. For example, when the Mi'kmaq and the Montagnais first saw Frenchmen drinking red wine, they were appalled because

comment: where the French were acquisitive, aggressive, and litigious, band members took pleasure in sharing their possessions, and they avoided confrontation with their fellows.<sup>75</sup> Concerning the open-handed generosity of Aboriginals, Father Biard said of the Mi'kmaq: "They are in no wise ungrateful to each other and share everything. No one would dare to refuse the request of another, nor to eat without giving him a part of what he has." Father Barthelmy Vimont of the Quebec Mission wrote that "presents among these peoples dispatch all the affairs of the country. They dry up tears; they appease anger; they open the doors of foreign countries; they deliver prisoners; they bring the dead back to life; one hardly ever speaks or answers except by presents."<sup>76</sup> Behaviour that caused much comment in the *Relations* and other early accounts was the perceived stoicism of Aboriginals in the face of physical hardship and provocation. Commenting on the conduct of the Aboriginal undergoing physical stress, Father Joseph Jouvency, the Jesuit historian, had this to say: "Whatever misfortune may befall them they never allow themselves to lose their calm composure of mind, in which they think that happiness especially consists. They endure many days fasting; also diseases and trials with the greatest cheerfulness and patience. Even the pangs of childbirth, although most bitter, are so concealed or conquered by the women that they do not even groan."<sup>77</sup> Nor did individuals captured in battle and undergoing torture: "The prisoner who has beheld and endured stake, knives and wounds with an unchanging countenance, who has not groaned, who with laughter and song has ridiculed his tormentors, is praised; for they think that to sing amid so many deaths is great and noble."<sup>78</sup> The behaviour that caused the most comment, however, was the response of the Aboriginal when provoked. Jouvency said that "they know nothing of anger", and Father Jacques Bruyas, writing from the Oneida Mission in Iroquois country, observed: "They know nothing of cursing. I have never seen them become angry, even on occasions when our frenchmen [*sic*] would have uttered a hundred

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they thought the wine was blood and the drinkers a species of cannibal. Initially, they had no desire to emulate the French. Subsequently, the Jesuits frequently castigated the secular French for selling liquor to the Aboriginals and for the effect it had on them. More significantly, the clerics also wrote about their efforts to make wine for sacramental purposes, as well as wine and beer for their own consumption. These labours would have been unnecessary if intoxicating beverages had been available from the Aboriginal population. *JR*, vol. 1, p. 285; vol. 5, pp. 119–121; vol. 6, pp. 75, 251; vol. 22, p. 241; vol. 35, p. 135. See also W. J. Eccles, *France in America* (Vancouver: Fitzhenry and Whiteside, 1972), p. 54; G. F. G. Stanley, "The Indians and the Brandy Trade During the Ancien Régime", *Revue d'histoire de l'Amérique française*, vol. 6 (1952–1953), p. 489. See also Father Joseph Jouvency on this subject in *JR*, vol. 1, p. 275.

75 See, for example, Lescarbot, *The History of New France*, vol. 3, pp. 215–216; *JR*, vol. 3, pp. 93–95. 76 *JR*, vol. 3, p. 95; vol. 22, p. 291. See also vol. 10, pp. 211–213; vol. 15, p. 157; vol. 38, p. 267; Lescarbot, *The History of New France*, vol. 3, p. 174; le Clercq, *New Relation of Gaspesia*, p. 238; Lafitau, *Customs of the American Indians*, vol. 2, pp. 60–61.

77 *JR*, vol. 1, pp. 275–277.

78 *Ibid.*, p. 273.

oaths.”<sup>79</sup> Many examples of such behaviour are recorded by observers of tribes throughout the northeast, and Hallowell argues that the Aboriginal’s impassive demeanour was achieved only with great effort by the individual, to promote interpersonal harmony and keep the peace.<sup>80</sup> Given these characteristics, it is not difficult to understand why so many observers commented on the relative absence of antisocial behaviour among the indigenous peoples that they equated with crime in contemporary France.

When they discussed in detail what they considered to be the methods of social control — the criminal law — of the northeastern tribes, it is obvious that commentators considered it to be also unique to the Aboriginal culture, because they made no attempt to compare it with the law in the cultures of antiquity or with their own. Unlike the religious, who spent much time and thought in learning and explaining the practices of the Aboriginal peoples, secular reporters made statements in passing which make it clear that they knew the tribal method of atoning for offences. They obviously did not understand the rationale for such practice, however, nor did they adduce any evidence of having witnessed the resolution of an offence by an Aboriginal on a fellow band member. Thus, for example, Champlain wrote that they “have no established judicial procedure among them, but only vengeance or compensation by gifts”.<sup>81</sup> There is not a great deal of such comment, since there was not much antisocial behaviour among kin-groups or between French and Aboriginal to report. Moreover, few observers were educated in jurisprudence. Consequently, a report of such behaviour and its outcome follows no format and, in most cases, is essentially confined to a circumstantial account of the commission of an offence and the manner in which the breach was healed.

79 *JR*, vol. 1, p. 275; vol. 51, p. 129. Given their impassive demeanour when provoked, it comes as no surprise to learn that tribesmen did not know how to “fight” with fists in the European style, as the account of Father Biard makes clear: if tribesmen “are more skillful in wrestling and nimble running, they do not understand boxing at all. I have seen one of our little boys make a Savage, a foot taller than himself, fly before him; placing himself in the posture of a noble warrior, he placed his thumb over his fingers and said ‘Come on!’ However, when the Savage was able to catch him up by the waist, he made him cry for mercy” (*JR*, vol. 3, p. 93).

80 After documenting this behaviour from primary sources, Hallowell demonstrates that commentators in the eighteenth and nineteenth centuries had observed much the same behaviour in northern Aboriginals remote from European influence as he had himself in the 1930s, while living with a band of Saulteaux on the Berens River in northeastern Manitoba (“Some Psychological Characteristics”, pp. 195–225). For an expanded discussion of how the behaviour of the Saultaux of Hallowell’s day resembled that of their seventeenth-century ancestors, see his *The Ojibwa of Berens River* [Manitoba] (New York: Harcourt Brace, 1992).

81 *The Works of Samuel de Champlain*, vol. 3, p. 191. See similar statements in Lescarbot, *The History of New France*, vol. 3, p. 215; Denys, *Description and Natural History*, p. 445. See also *The Works of Samuel de Champlain*, vol. 3, pp. 184 ff, in which he reports that the French refused to accept gifts in reparation for the alleged murder in 1616 of two French workers by a Montagnais on the grounds that “the lives of Christians must not be sold for merchandise” (p. 190, n. 2). For a perceptive explanation of the Aboriginal method of making reparation for an offence, see *JR*, vol. 28, p. 51.



The most serious offence against the person, homicide (*meurtre*), which, according to Father Bressani of the Huron Mission, was “very rare”,<sup>82</sup> could have two outcomes: it could lead to a composition of the matter, or to a blood feud between the kin of the killer and that of the victim.<sup>83</sup> In the worst case, and the single exception to the intra-group offences discussed here, if the deceased was a member of a different tribe it could result in war between the two tribes. Avoidance of such a conflict was a vitally important consideration in any case because breaking the peace of the countryside would put all competing kin at hazard while it lasted. Hence, composition was the preferred resolution to the problem. This came about if an emissary from the killer’s kin offered restitution by customary gifts to the victim’s kin, and the offer was accepted.<sup>84</sup> An example of this practice occurred in 1640 at Three Rivers. Two Abenaki from what is now Maine arrived to report that a Montagnais chief, Makheabictichiou, had been killed in their country by an Abenaki. “They said that this deed was done in drunkenness; that all his countrymen had strongly disapproved of it, and that they had been sent to give satisfaction to the parents and to the relatives and to the whole Nation of the deceased.”<sup>85</sup> Acceptance of the offer could conclude the matter expeditiously and prevent a long and possibly ruinous conflict in which many lives would be lost.<sup>86</sup> Thus, it is evident that the object of this practice was not to punish the offender in the European sense, but to restore cohesion and harmony between the offended and the kin of the offender.<sup>87</sup> This is not to say, however, that the offender would feel no remorse or would be encouraged to repeat the offence. In the first place, given his psychological conditioning, he would be aware that, in killing an individual with whom he and his kin were at peace, he had behaved in an uncharacteristic and offensive manner that had the potential to break the harmonious relations between his kin and those of his victim and so bring on the possibility of a blood feud. Secondly, if restitution was made, his kin would be impoverished. Thus, whatever the outcome, mentally the murderer would, in the parlance of the Jesuits, suffer the tortures of the damned.

82 *JR*, vol. 38, p. 273; see also vol. 10, p. 215.

83 *JR*, vol. 3, pp. 93–95; vol. 10, p. 215; vol. 22, p. 291. See also Sagard, *The Long Journey*, pp. 163–164; Lafitau, *Customs of the American Indians*, vol. 1, pp. 303–307.

84 Offering restitution for crimes by gifts was a special case of a practice that permeated Aboriginal society at every level (*JR*, vol. 22, p. 291). For a discussion of the purposes of gift giving and the differing perceptions of Europeans and the Aboriginal peoples respecting the practice, see Axtell, *Beyond 1492*, p. 66; Bruce G. Trigger’s discussion of gift giving and the blood feud among the Huron, *Children of the Aataentsic*, pp. 59–60.

85 *JR*, vol. 21, pp. 67–69.

86 *JR*, vol. 3, pp. 93–95; vol. 10, pp. 215–217; Lafitau, *Customs of the American Indians*, vol. 1, pp. 303–307.

87 While several observers commented on aspects of reparation, none of the reporters the writer has studied have addressed directly this aspect of the practice of reparation. See *JR*, vol. 33, pp. 233–235; vol. 38, p. 277; le Clercq, *New Relation of Gaspesia*, p. 244.

When gifts were accepted as restitution, the donors gave many items and gave of their best. Wampum, other articles of adornment, clothing, food, tobacco, and implements for domestic economy or for war and the chase were presented, one by one. Each gift was preceded by a long oration that described the purpose of the gift and displayed what European observers considered to be the dignity and natural eloquence of Aboriginal speakers. A typical comment was that of Charles Huault de Montmagny, an early governor of New France, who compared the orations of Montagnais speakers at a council meeting to those of Roman senators in the Forum.<sup>88</sup> These speeches were made in a ceremony that could continue for days and was attended by members of both kin groups, those of the offender and those of the deceased. Jesuits have left several descriptions of such ceremonies that they observed or to which they were a party. Rather than paraphrase, it is better to let Father Brébeuf of the Huron Mission set the scene and describe the ceremony, circa 1636:

[I]f laws are like the governing wheel regulating communities ... it seems to me that, in view of the perfect understanding that reigns among [the Hurons], I am right in maintaining that they are not without laws. They punish murderers, thieves, traitors and Sorcerers; and ... the little disorder there is among them in this respect makes me conclude that their procedure is scarcely less efficacious than is the punishment of death elsewhere; for the relatives of the deceased pursue not only him who has committed the murder, but address themselves to the whole village, which must give satisfaction for it, and furnish, as soon as possible ... as many as sixty presents, the least of which must be of the value of a new Beaver robe. The Captain presents them in person and makes a long harangue at each present that he offers so that entire days sometimes pass in this ceremony. There are two sorts of presents, some, like the first nine, which they call *Andaonhaan*, are put into the hands of relatives to make peace, and to take away from their hearts all bitterness and desire for vengeance that they might have against the person of the murderer.... To begin: The Captain speaking, and raising his voice at the name of the guilty person, and holding in his hand the first present as if the hatchet were still in the death wound ... "There" says he "is something by which he withdraws the hatchet from the wound, and makes it fall from the hands of him who would wish to avenge this injury." At the second ... "There is something with which he wipes away the blood from the wound in the head." By these two presents he signifies his regret for having killed him and that he would be quite ready to restore him to life, if it were possible. Yet, as if the blow had rebounded on their native land, and as if it had received the greater wounds, he adds the third present, saying ... "this is to restore the country;" ... "this is to put a stone upon the opening and the division of the ground that was made by this murder...." They claim by this present to

88 *JR*, vol. 9, pp. 227–233. Montmagny was well qualified to voice this opinion, having received a classical education at the Jesuits' Collège de La Flèche and the Université d'Orléans. Jean-Claude Dubé, *Le Chevalier de Montmagny* (St. Laurent, Que.: Fides, 1999), pp. 103–104. See also the similar comments in *JR*, vol. 1, pp. 277–279; vol. 34, pp. 209–211; vol. 38, pp. 261–263; vol. 72, p. 365.

reunite all hearts and wills, and even entire Villages, which have become estranged.... The fifth is made to smooth the roads and to clear away the brushwood; ... that is to say, in order that one may go henceforth in perfect security over the roads, and from village to village. The four others are addressed immediately to the relatives, to console them in their affliction and to wipe away their tears.... “Behold,” says he, “here is something for him to smoke,” speaking of his father or his mother, or of the one who would avenge his death.... Also, following this present, they make another to restore completely the mind of the offended person.... The eighth is to give a drink to the mother of the deceased, and heal her as being seriously sick on account of the death of her son.... Finally, the ninth is, as it were, to place and stretch a mat for her, on which she may rest herself and sleep during the time of her mourning.... These are the principal presents, — the others are, as it were, an increase of consolation and represent all the things that the dead man would use during life. One will be called his robe, another his belt, another his canoe, another his paddle, his net, his bow, his arrows, and so on. After this, the relatives of the deceased regard themselves as perfectly satisfied.<sup>89</sup>

Satisfied they may have been, but a greater benefit may have been the cathartic effects of this impressive ceremony on all who were witnesses, and it must have been of great help also to the kin of the deceased in coming to terms with the loss of the victim. Furthermore, the economic impact of the gifts would have helped materially to fill the void caused by the death of a hunter or a mother. However, Brébeuf makes it clear that, if restitution were not forthcoming, self-help was the alternative and, indeed, if the dispute were between tribes, as opposed to clans or families or between French and Aboriginals, war — the blood feud writ large — could result.<sup>90</sup>

A situation of the latter kind arose April 28, 1647, when Jacques Douart, a Jesuit servant, was brained with a hatchet in Huronia. According to the narrator, Father Paul Rageneau, some Huron bands were hostile to the faith because they blamed the Jesuits for causing the pestilence that was then decimating the Huron. The disaffected commissioned two of their number to kill a member of the Order to demonstrate their opposition to Jesuit attempts to convert them to Christianity. Since, in addition to the pestilence, the Iroquois were also devastating Huronia at that time, the Huron had no wish to lose the friendship of the secular French also. Hence, the killing of Douart caused all the band chiefs, both adherents to Christianity and the disaffected, to attend a tribal conclave. After three days of discussion “it was publicly decided that reparation should be made to [the Jesuits] in the name of the whole country for the murder that had been committed”.<sup>91</sup>

89 *JR*, vol. 10, pp. 215–221. For a later report of this matter, see *JR*, vol. 38, pp. 273–287. For the tortuous account of a later killing with an indeterminate conclusion, see *JR*, vol. 13, pp. 11–17.

90 *JR*, p. 10, p. 225.

91 *JR*, vol. 33, p. 233.

When the Captains had come to their decision, we were summoned to their general meeting. An elder spoke on behalf of all, and, addressing himself to me as the chief of the French, he delivered a harangue to us that savors not at all of Savagery, and teaches us that eloquence is more a gift of nature than of art. I add nothing to it.

“My brother,” the Captain said to me, “here are all the nations assembled. We are now but a handful of people; Thou alone supportest this country, and bear-est it in thy hand. A bolt from the Heavens has fallen in the midst of our land, and has rent it open; shouldst thou cease to sustain us, we would fall into the abyss. Have pity on us. We come here to weep for our loss, as much as for thine, rather than to discourse. This country is now but a dried skeleton without flesh, without veins, without sinews and without arteries, — like bones that hold together only by a very delicate thread. The blow that has fallen on the head of thy nephew, for whom we weep, has cut that bond. A demon from Hell put the hatchet in the hand of him who committed that murder. Is it thou, O Sun which illuminest us, that ledst him to do that evil deed? Why didst thou not hide thy light, so that he himself might have a horror of his crime? Wert thou his accomplice? Not at all, for he walked in the darkness and did not see where his blow struck. He, the wretched murderer, thought that he was aiming at the head of a young Frenchman; and with the same blow he struck his country, and inflicted on it a mortal wound. The earth opened to receive the blood of the innocent, and has left an abyss that is to swallow us up, since we are the guilty ones....”

He continued for a long time in this strain and then said “[S]peak now, and ask whatever satisfaction thou wishest, for our lives and our property belong to thee. And, when we strip our children to bring thee the satisfaction thou desirest, we shall tell them that it is not thee whom they must blame, but him who has made us criminals by striking so evil a blow....”<sup>92</sup>

Rageneau, who had been coached by his Huron supporters, responded in kind to this oration, and then gave the elder a bundle of small twigs to indicate the number of gifts the Jesuits desired. These were divided among the council members so that each band would provide one or more gifts. The chiefs then departed for their villages, where they exhorted the members of their bands to provide the gifts. “When the day designated for the ceremony [of restitution at the Jesuits’ mission house] had arrived, crowds flocked to it from all parts” with their donations, and proceedings similar to those described above by Brébeuf ensued and were completed May 11.<sup>93</sup> Like Brébeuf, Rageneau describes these proceedings, but does not quote the speeches of the gift givers; nevertheless, Rageneau’s account runs to five pages of text.<sup>94</sup> Douart’s case

92 See the complete transcript of the speech in *JR*, vol. 33, pp. 235–239. See *JR*, vol. 21, pp. 43–59, and vol. 27, pp. 2–55, for other examples of eloquence during the presentation of gifts.

93 *JR*, vol. 33, p. 241.

94 *Ibid.*, pp. 241–249. The account of the Douart affair is given one chapter that runs to 12 pages in the Relation of 1648–1649 (pp. 229–249).

demonstrates another characteristic of the Aboriginal method of settling such matters: it was expeditious. From the day of the murder to the completion of the reparation ceremony, only 14 days had elapsed. This was in strong contrast to the contemporary French criminal law system, where a case could drag on for months, even years.<sup>95</sup> It is also of interest to note that the French view concerning the absence of law among the tribes, as exemplified by the Jesuits, had undergone a sea change in 30 years.

As the severity and the circumstances of an offence changed, so the demand for restitution was scaled up or down. Ragueau tells us that in 1648 the murder of a member of another tribe brought a demand for 60 gifts or more. If the deceased was a fellow band member, 30 would suffice, but 40 was demanded for a woman of the tribe because “women cannot defend themselves; and, moreover, as it is they who people the country, their lives should be more valuable to the public, and their weakness should find powerful protection in justice. For a stranger, still more are exacted; because they say that otherwise murders would be too frequent, trade would be prevented, and wars would too easily arise between the different nations.”<sup>96</sup> For lesser offences in the woodlands, restitution was also the customary method of restoring good relations between the kin of the offender and that of the offended.<sup>97</sup> For example, “bloody wounds, also, are healed only by means of these presents, such as belts [of wampum] or hatchets, according as the wound is more or less serious”, as were cases of “wife stealing” among the Mi’kmaq.<sup>98</sup>

No account of an actual case of this type, where the offender and the offended were Aboriginals, has been found in the literature. However, the conduct and disposal of such a case can be inferred from the proceedings that took place concerning a charge of attempted assault on a Récollet priest, Father Joseph le Caron. While he was working in a Huron village in 1623, a band member attempted to assault him with a club. A colleague, Brother Gabriel Sagard, laid a complaint with the band chief, who convened a meeting of the band council. Sagard was invited to address the council and to

“make your own claim and state openly ... what your wrongs are and wherein and in what manner you have been injured, and upon that I will base the speech that I shall make, and then we shall do you justice.” We were not a little surprised at first at the caution and wisdom of the captain and how judiciously he went about it all, right up to the end of his final conclusion, which was entirely satisfactory and encouraging to us.<sup>99</sup>

95 Brown, “They Do Not Submit Themselves to the King’s Justice”, pp. 386–387.

96 *JR*, vol. 33, pp. 243–245.

97 *JR*, vol. 14, pp. 269–271; vol. 23, pp. 215–217; vol. 31, pp. 85–87.

98 *JR*, vol. 3, pp. 93–95; vol. 10, p. 223.

99 Sagard, *The Long Journey*, pp. 164–166.

Sagard informed the council about the assault, after which the chief summed up in favour of the Récollets and explained the Huron system of atonement by restitution. In a concrete example of this, the band supplied several bags of corn to the Récollets, the award being made by the council.

In a later encounter between the Nipissing and the French in 1633, the shoe was on the other foot: the Nipissing had come down to Quebec to trade their furs and, while engaged in barter, they saw a French boy beating a drum. One of the tribesmen, fascinated by the spectacle and the sound, came too close to the youth for comfort, so the drummer hit him on the head with a drumstick, causing a wound that began to bleed profusely. "Immediately all the people of his tribe who were looking at the drummer, seeing this blow took offence at it." They said: "Behold, one of thy people has wounded one of ours; thou knowest our custom well; give us presents for this wound."<sup>100</sup> In reply, they were told that when a French person committed an offence he was punished. In this case the drummer boy would be whipped. When it was apparent that the French were preparing to carry out the punishment, the Nipissing protested that he was only a child and thus not responsible for his actions. Their protests appearing to be of no avail, one of the Nipissing threw a blanket over the boy and said: "Strike me if thou wilt, but thou shall not strike him." Father le Jeune, who related the incident, explained the Nipissing's action by remarking that an Aboriginal "cannot chastise a child nor see one chastised" and continued, ruefully: "How much trouble this will give us in carrying out our plans of teaching the young!"<sup>101</sup> The incident was settled otherwise and the youth escaped punishment.

As the years passed, the sedentary Huron came to be characterized by the French as a nation of thieves, in contrast to the nomadic Montagnais and Mi'kmaq.<sup>102</sup> In the main, early commentators make this accusation in passing and do not provide details of cases of what they term "theft", which is unfortunate because this transgression and its outcome bore little relation to the plethora of offences that were defined as theft, and the resulting punishments, in French jurisdictions.<sup>103</sup> Father Guiseppi Bressani of the Huron Mission, who wrote in the late 1640s, repairs these omissions when he tells us that, in a case of theft of an artifact from the habitation of the owner, the outcome could beggar the offender and his family. Bressani wrote that "he who is convicted of it may be justly despoiled, he and all his house; and this is carried out in such a way that a man who may have stolen an axe, for

100 *JR*, vol. 5, p. 219.

101 *Ibid.*, p. 221; see also *The Works of Samuel de Champlain*, vol. 3, p. 142.

102 For accusations of theft levelled at the Huron, see Sagard, *The Long Journey*, p. 141; *JR*, vol. 5, pp. 123, 241–243; vol. 7, pp. 223, 227; vol. 10, p. 67. Of the Mi'kmaq, Biard said in 1611, "this is not a nation of thieves", a judgement echoed 30 years later by Father André Richard, who wrote that "they have hands very clean of others' property" (*JR*, vol. 3, p. 139; vol. 24, p. 151). Similar remarks were made about the Montagnais by Sagard in 1623 (*The Long Journey*, p. 151) and by le Jeune in 1633 (*JR*, vol. 5, p. 123; vol. 6, p. 249).

103 Von Bar, *A History of Continental Criminal Law*, p. 287.

instance, or a similar trifle, loses, if he is found guilty, all his goods, — axes, kettles, clothes, provisions, nets, canoe, etc., — until, if the prosecutor use rigour, he, his wife, and his children are left in a total destitution of everything.”<sup>104</sup> There are several important lessons to be learned from this apparently straightforward narrative.

To Bressani an “axe” was a “trifle”, as was, probably, a kettle.<sup>105</sup> Not so to the Hurons. Such artifacts were European manufactures of high daily utility that rapidly displaced the stone, wooden, and pottery implements fabricated by Aboriginal artisans. They could not manufacture metal axes and kettles, as they could all these other items. As such, they were highly valued possessions that could be obtained legitimately only by barter or gift, or illegitimately by theft.<sup>106</sup> This high value, coupled with the fact that the act of theft would cause disruption and disharmony within the band, was in all probability the reason for the seemingly excessive forfeiture, as seen through the eyes of the Italian Bressani. Furthermore, although the Jesuit does not make the point, the method of dealing with this offence was particular to Aboriginals. Unlike the punishment meted out to a French subject by a French court, there was no capital or corporal punishment, no imprisonment or statutory fine, but rather a special case of reparation.<sup>107</sup> Likewise, the images conjured up in the imagination of an individual raised in a jurisdiction subject to European law, by the words “prosecutor”, “convicted”, and “found guilty” in Bressani’s account bear little relation to actuality among the indigenous peoples of the northeast. The priest tells us that the “prosecutor” was the aggrieved individual, the victim of the theft, and was self-appointed. This could come about if an individual missed a possession — say an axe — from his habitation and then identified it in the possession of another. In such a case the rule of procedure was not to attempt to seize the property, but rather to question the person in possession as to where and how it had been obtained. If no answer was forthcoming, then in the eyes of the victim and the band the possessor was “convicted” of theft and had to suffer the mulct. If, on the other hand, the pos-

104 *JR*, vol. 38, p. 269; see also vol. 10, p. 223.

105 Champlain had also referred to such items as “trifles” in 1615, but he appears to have been more perceptive than Bressani, because he qualified his remark by saying that such “trifles” were “of no small value among [the Huron]” (*The Works of Samuel de Champlain*, vol. 3, pp. 162–163).

106 The “fur trade” is a familiar topic in Canadian history books, and much has been written about the European demand for beaver. A fact which has not received equal prominence is that, while Europeans could make do quite easily without the hats and garments fabricated from fur, many of the European implements exchanged for them soon became indispensable to the Aboriginals. For example, during the Iroquois onslaught on Huronia in the late 1640s, Hurons did not go down to trade with the French at Quebec in 1647 because of the threat of ambush by the Iroquois. “But the necessity of obtaining hatchets and other French goods” compelled them to run the gauntlet in 1648 (*JR*, vol. 32, p. 179). For discussions of this topic, see Axtell, *Beyond 1482*, pp. 134–138; Trigger, *Children of Aataentsic*, pp. 358–365; Harold A. Innis, *The Fur Trade in Canada* (Toronto: University of Toronto Press, 1956), pp. 9–22.

107 *JR*, vol. 10, pp. 65–67; vol. 34, pp. 39–41, 51; see also von Bar, *A History of Continental Criminal Law*, p. 287.

essor said that he had received the axe as a gift or bartered for it, “he must tell the name of [the person] who gave or sold it to him. Then [the victim] goes to find the seller, and puts the same question to him; and, if this one name to him another, he goes to find him, and continues the investigation until he finds one who has it from nobody. In this and in similar things they display great sincerity,— never naming an innocent man; while the guilty one, through his silence, confesses himself the culprit.”<sup>108</sup>

Bressani then proceeds to discuss what he terms theft from outside the habitation of the owner. He cites a case in which an old woman was carrying a quantity of wampum in a pouch. Before she began to work in a field, she hung the pouch on a tree so it would not hamper her, and then left it on the tree when she went to work in a second field. A neighbour watched this activity and, when the owner was in the second field, “takes the pouch before [the owner’s] very eyes, and exclaims, in the manner of the country, ‘I have made a good find!’ and goes away.” Bressani discussed this event with the band chiefs “of whose prudence we took note”, who informed him that “if the matter is considered with strictness, the prize is good, — at least the old woman has not the right to dispossess the other woman.”<sup>109</sup> Thus, among the Huron, and notwithstanding Bressani’s assertion of theft, any artifact discovered outside the habitation of the owner and without a legitimate guardian in possession became the property of the finder, if he or she so desired.

After discussing theft among the Huron, Bressani deals with theft by them from Europeans, but in so doing, he displays a less than perfect understanding of tribal culture.<sup>110</sup> He states that Aborigines steal “not for actual utility, but from pure vice. They have sometimes stolen implements of various trades, wholly useless to them, the hands of clocks, etc.; and once, when one of our Fathers was saying the Office by the light of a hole in the cabin, they took through that hole the breviary from his hands without his being able to see or to catch the thief.”<sup>111</sup> Bressani wrote in the late 1640s, and by that time it had been well established by Father de Brébeuf and Father le Jeune that, to the Huron, a clock was a living thing, and more, a “Demon of death”

108 *JR*, vol. 38, pp. 269–271. For a 1662 report of an actual case of theft by a Christian Iroquois that was solved by other means and in which restitution was made, see *JR*, vol. 57, p. 117.

109 *JR*, vol. 38, p. 271.

110 As noted above, Bressani and some other early observers accuse Hurons of theft, with the implication that the stolen object is for the personal use of or for the gain of the thief. The question is, would the Huron have agreed with these accusations, or even understood them before European artifacts became available to them? Given their communal living conditions and their communal use of most artifacts prior to first contact, there is reason to believe that many actions construed by Europeans as theft were innocent of that intent. It is noteworthy, too, that the European perception changed over the years. For example, Champlain, who did not mince his words, spent considerable periods among the Huron in 1609 and 1615 and wrote detailed descriptions of their mores and customs. There is no mention in these narratives of theft among the Huron or by them from the French. On theft among the Huron as the years passed, see Trigger, *Children of Aataentsic*, pp. 61–62, 181, 361.

111 *JR*, vol. 38, p. 269.



that brought on the pestilence that was killing their children.<sup>112</sup> Similarly, books, letters, or inscribed pieces of paper, especially when read aloud as a priest would read a breviary, were seen as repositories of spells by which good or evil could be done and pestilence could be cured or spread.<sup>113</sup> As such, clocks, books, and other printed or written materials would have been prized by Huron *arendiowane*<sup>114</sup> — medicine men or shamen — to whom the Jesuits referred as *sorciers* (sorcerers), if not by many other Hurons, as would the “magic” incantations of the Jesuits, if they could have been induced to share them.<sup>115</sup>

Sorcerers and sorcery were much upon the Jesuit mind from first contact with the peoples of the northeast because the individuals the priests identified by this appellation were the religious practitioners of the northeastern tribes.<sup>116</sup> As such, they were seen by the Jesuits to be contenders for the souls of the Aborigines and hence were castigated for their beliefs and practices. Thus Father Pierre Biard, the first Jesuit to report on the tribes of Acadia, said of the Mi'kmaq, circa 1612: “those among them who practice medicine, are identical with those who are at the head of their religion, i.e., *Autmoins*, whose office is the same as that of our Priests and our Physicians. But in truth they are not Priests, but genuine sorcerers; not Physicians but jugglers, liars and cheats.” He proceeds to give an eye-witness account of a sorcerer at work as a medicine man.<sup>117</sup> Father le Jeune was more specific about the Montagnais in 1637. It was, he said, the “office of the sorcerer to interpret dreams, to explain the singing of birds”, to “sing and beat their drums to heal the sick, to kill their enemies in war, and to capture animals in the hunt”.<sup>118</sup> Two years later, con-

112 *JR*, vol. 8, p. 111; vol. 15, p. 35. Bressani himself comes to this conclusion later in his narrative; see *JR*, vol. 39, p. 131.

113 *JR*, vol. 15, p. 33; vol. 16, p. 43; vol. 17, p. 135.

114 *JR*, vol. 10, p. 35; vol. 13, p. 187. Such an individual was known to the Montagnais as a *manitousiou* (*JR*, vol. 6, p. 125; vol. 7, p. 69) and as an *aoutmain* by the Mi'kmaq (*JR*, vol. 1, p. 75; vol. 3, p. 91).

115 *JR*, vol. 12, p. 11.

116 It is notable that the Jesuits observed the distinction between sorcery and witchcraft that the learned lawyers of the church began to elaborate in the fifteenth century. There is little or no mention of witchcraft in the *Relations*, whereas there is much discussion of this subject in modern texts discussing the culture of the peoples of the northeast. Witchcraft was a species of heresy and thus could be committed only by Christians. See the definitions and discussions of sorcery and witchcraft in Russel Hope Robbins, *The Encyclopedia of Witchcraft and Demonology* (New York: Crown Publishers, 1966), p. 471–474, 546–551. It is also to be observed that there is no mention of witchcraft in the Americas in Henry Charles Lea's magisterial three-volume *Materials Towards a History of Witchcraft* (Philadelphia: University of Pennsylvania Press, 1956).

117 *JR*, vol. 3, pp. 117, 119–125. See also Axtell, *Beyond 1492*, pp. 158–162.

118 *JR*, vol. 12, p. 9; vol. 16, p. 149. Also see, for example, le Jeune's account of a ceremony in which a reputed Montagnais sorcerer used the contents of his medicine bundle to cast a spell on and kill a second sorcerer who, the former alleged, had caused his ill health and would kill him if he did not act quickly. There is no subsequent report of the sudden death of either sorcerer, and le Jeune was sceptical of the efficacy of the process, but it is apparent that the Aboriginal observers were convinced that the second sorcerer would die (*JR*, vol. 6, pp. 195–201). For the death by drowning of four Huron fishermen who incurred the hostility of a sorcerer, see *JR*, vol. 19, p. 87.

cerning the Huron, le Jeune came to the conclusion that sorcerers had even more terrible attributes, for he characterized them as “charlatans who engage in singing, blowing upon the sick, consulting Devils, and killing men by their charms”. The relevance of the latter fact to this argument is that, to the indigenous peoples, practising sorcery to cause death was an exception to the general rule that an offence could be atoned for by restitution with suitable and sufficient presents. This offence was punished by summary execution.<sup>119</sup>

There are many accounts of alleged sorcery in the *Relations*.<sup>120</sup> In most of these the observers are sceptical about what they have seen or have been told, such as in reports having to do with the onset of disease and its treatment or mistreatment by sorcerers, in which a tuft of hair or a piece of leather, wood, or other artifact associated with the patient or victim played a prominent part.<sup>121</sup> In other accounts of sorcery, Jesuits were content to relate the facts. This was the case when Father François le Mercier reported the fate of a reputed sorcerer, a woman of Ossossané, the capital of the Huron confederacy. A man who “thought he had been bewitched by her sent for her under the pretext of inviting her to feast; she had no sooner arrived than her sentence was pronounced without other form of trial.” There was no appeal and she was dispatched summarily by her godfather, who brained her with an axe. Her body was burned and reduced to ashes the next day in the middle of the village.<sup>122</sup> Father Jerome Lalement relates that similar punishment was meted out to a man who allegedly caused the death of his wife and who had blamed her demise on sorcerers. Soon after his wife’s death, “while going through the villages to raise the cry of another massacre ... [he] was assailed by a man of the country, — who, accusing him of being a sorcerer, split his head, without any complaint or investigation being made”.<sup>123</sup> During the time of the pestilence and the Iroquois onslaught on Huronia, when Jesuits were in bad repute among many Huron, Father Brébeuf saw a band member brain a fellow band member with a hatchet near the entrance to the Jesuit cabin. As it was dusk, Brébeuf thought the assailant had killed the

119 Hallowell argues convincingly that sorcery “was a highly institutionalized means of covert aggression at the disposal of the Indians”. By this means an individual who considered himself wronged would have been able to retaliate against a fellow band member without disrupting the harmonious relations of the band dictated by the culture of the woodlands. Thus some of the killings attributed to sorcery could well have been initiated by an aggrieved third party who induced a sorcerer to act as his surrogate (“Some Psychological Characteristics”, p. 214).

120 See, for instance, the further incidents reported by Father le Jeune, *JR*, vol. 8, p. 125; vol. 13, pp. 155–159; vol. 14, p. 53; vol. 15, p. 33; the accounts of Father Jerome Lalement, *JR*, vol. 19, p. 87; and Father Paul Ragueneau, *JR*, vol. 33, pp. 199–201, 217–223.

121 Such articles could be found in the medicine bundle of an individual, which is why the bundle would have been one of the few artifacts to become the object of theft in Aboriginal societies before or at the time of first contact (*JR*, vol. 12, p. 15).

122 *JR*, vol. 14, p. 37.

123 *JR*, vol. 19, pp. 85–87. This behaviour may seem to deliver rough justice but, even today, many people have an irrational fear of the occult and “sorcerers” are in bad repute. See Robbins, *Encyclopedia of Witchcraft*, who reports that the latest case to come before the courts was in 1950 (p. 474).

wrong man, so he asked him: “Was it not perhaps for me that this blow was intended?” “No,” answered the other, “go on; this man was a sorcerer, and not thou.”<sup>124</sup> Whether or not the Jesuits were convinced of the veracity of such accounts and statements by their interlocutors, it is evident that such beliefs were firmly embedded in Aboriginal culture, and still are, as was recently demonstrated in the case of Leon Jacko.

Jacko, a member of the Ojibway Nation from the Shegiuanda Reserve on Manitoulin Island, was acquitted of manslaughter in Provincial Court at Gore Bay, Ontario, on May 29, 1997. The facts were not in dispute. In June 1995, Jacko had bludgeoned to death a fellow band member, Ronald Thompson, with a ceremonial walrus bone the size of a baseball bat. He pleaded not guilty on the grounds that he was defending himself from Thompson, who was a “Bearwalker”: that is, a sorcerer, who had boasted of his power to kill his enemies with his spells. Thompson’s niece, Carol Aguo-nie, gave substance to Jacko’s assertion when she stated in evidence that Thompson “had a reputation as a Bearwalker” and that she had “seen him strangle a cat and cut off its ears to use for bad medicine”. Consequently, she was “careful keep her hair out of his reach as she knew if he got a lock of her hair he could bring bad medicine to her”.<sup>125</sup> Referring to this and to similar testimony from other witnesses, the presiding justice, Judge Richard Trainor, said: “the Accused knew of [Thompson’s] reputation and power as a Bear-walker, including his ability to transform himself into a bear, adding to his power and strength. That reputation and spiritual belief is not to be looked at or judged by the standards of non-native society. I accept the evidence on native spirituality as being a sincerely held belief.”<sup>126</sup> In making this assertion, the judge gave judicial recognition to the fact that the sources of Canadian law are more diverse than the law that was part of the cultural baggage that accompanied European settlers to North America and was eventually imposed by them on the indigenous peoples. He also created a legal precedent that would rule in any future cases concerning alleged sorcerers.<sup>127</sup>

124 *JR*, vol. 39, p. 135.

125 *R. v. Jacko*, “Reasons for Judgement”, June 17, 1997, Ontario Court (General Division), p. 5. I am indebted to Mr. Berk Keaney, counsel for Leon Jacko, who sent me this document.

126 *Ibid.*, p. 20.

127 Judge Trainor’s decision set aside that of Judge John Rose in *R. v. Machekequonabe*, the 1896 case that established the precedent for the trial of Aboriginals accused of killing alleged sorcerers prior to *R. v. Jacko*. As in the Jacko case, the facts were not in dispute. Machekequonabe, “a member of a tribe of pagan Indians”, in the vernacular of the day, shot and killed what he had reason to believe was a Wendigo, or a reputed sorcerer, at Rat Portage in circumstances similar to those in the Jacko case. But after Judge Rose told the jury, “I think I must direct you, as a matter of law, that there is no justification here for the killing, and culpable homicide without justification is manslaughter, so ... I think it will be your duty to return a verdict of manslaughter”, Machekequonabe was so convicted. The conviction was upheld by the Court of Appeal in a seven-line judgement, and he was punished by the full rigour of Canadian law. *R. v. Machekequonabe*, 2 CCC pp. 138–140 (Ont. CA) (1897); 28 OR 309 (1896). See also the able discussion of this and following cases involving sorcerers in Sydney L. Harring’s *White Man’s Law* (Toronto: Osgoode Society, 1998), pp. 217–238.

Apart from sorcery, Aboriginals of the early seventeenth century punished only one other offence by execution: betrayal of the group, or *trahison* in the lexicon of the Jesuits.<sup>128</sup> Among peoples of the northeast, giving aid and comfort to an enemy was seen to be a dire threat to the existence of the whole group: tribe, band, or family. Therefore the enmity of all was directed at the betrayer, and his or her death was the result. Moreover, summary execution was the rule for an individual taken in the act of betrayal. However, according to Father Brébeuf, such incidents “are very rare”.<sup>129</sup> They must have been, for, while some instances are mentioned in passing, only one detailed incident can be found in the *Relations*: the case of Skandahietsi. Skandahietsi, a Huron member of a war party on its way to Iroquois country, was sent on a scouting expedition and was captured by an Iroquois war party going in the opposite direction. Skandahietsi betrayed his fellow warriors, who were ambushed and routed by the Iroquois. He then joined the Iroquois and, sometime later, was sent to spy on his former kin. He was recognized, seized, questioned, and, having confessed, was executed in the traditional fashion by having his head split open with a hatchet.<sup>130</sup> Lescarbot also relates a case of betrayal. It was the practice of the Acadian tribes to put pelts among the possessions of the deceased at the burial site to help provide the wherewithal that would support them in the other world. Early French traders learned of this practice and suborned a member of a band to learn the whereabouts of the tribal burial ground, which they despoiled of the pelts and other valuable artifacts. Members of the band subsequently learned the identity of the informer, and he was executed summarily.<sup>131</sup>

In consideration of all the evidence adduced above, it is clear that the early commentators were wrong. There was law among the tribes of the northeast, and particularly criminal law, albeit of a different kind and process than French law. The evidence is based on the writings of some of the early commentators themselves, particularly the Jesuits. In some cases they may not have interpreted what they observed correctly, and they used French words with specific legal definitions to describe actions of Aboriginals that bore little or no relation to the reality of those actions. Nevertheless, what they did report was more than sufficient to cause Father Joseph Lafiteau, the Jesuit historian and ethnologist, to acknowledge that there was law among the tribes of the northeastern woodlands. After many years as a missionary in Montreal and a close study of the *Jesuit Relations* and other relevant doc-

128 During the period when the *Relations* were written, treason — *trahison* — was a sub-species of the capital crime of *lèse majesté*, an attempt, successful or not, to kill the French monarch. *Trahison*, also a capital crime, was defined as disloyalty to the monarch or to one’s feudal lord (von Bar, *A History of Continental Criminal Law*, pp. 162, 282). Since there were no kings or lords among the Aboriginals of the northeast, the offence cited as “treason” by the Jesuits was, in fact, the offence of betraying the kin-group or community.

129 *JR*, vol. 8, p. 123.

130 *JR*, vol. 35, pp. 47, 217–221.

131 Lescarbot, *The History of New France*, vol. 2, p. 352.

uments, he wrote of the indigenous peoples in his study of 1724 that “these people, without written laws, do not fail to have basically a strict system of justice”.<sup>132</sup> However, there was much less law than in contemporary France, and much less need for it. As such, it was sensible and appropriate for the circumstances of the peoples of the area. In France, with retribution or deterrence as the objective of the justice system, the individual alone was responsible for his actions and suffered death or other punishment for the commission of a crime. If a pecuniary or economic penalty was exacted, the proprietor of the jurisdiction was the beneficiary. There was little catharsis for a victim or his kin at the trial of the malefactor, or in his punishment. In contrast, and apart from cases of sorcery and betrayal, Aboriginal justice sought to restore social cohesion and harmony among the group by restitution, which was a collective responsibility. In this way, the offender and his kin acknowledged that the law had been transgressed, and the victim or his kin were recompensed by the full economic benefit of the gifts. As the Jesuits came to realize, laying this heavy burden on the group for wrongdoing was a greater deterrent to committing offensive actions than was capital or corporal punishment. Finally, there can be little doubt that in serious cases the drama of the ceremony at which the *Andoanhaan* and other gifts were presented had a beneficial and therapeutic effect on the emotional state of the victims and their kin, as well as on other participants and onlookers.

132 Lafitau, *Customs of the American Indians*, vol. 1, p. 308.